THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER HUDSON,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, *et al*.,

Defendants.

Civ. Action No. 18-CV-4483-RWS
Judge Robert W. Sweet

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S COMPLAINT

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Plaintiff respectfully submits this memorandum of law in opposition to the motions to dismiss by the Retirement Board Defendants (ECF Nos. 54, 56, 57), the National Football League Management Council (ECF Nos. 52, 53, 55), and the National Football Players Association (ECF Nos. 61-62).

INTRODUCTION

Plaintiff Christopher Hudson, a former, now-disabled NFL football player, brings this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, on behalf of a Class of participants in and beneficiaries of the Bert Bell/Pete Rozelle NFL Player Retirement Plan ("the Plan") against the fiduciaries of the Plan to remedy their failure to make critical disclosures about the Plan that have harmed disabled participants to obtain reclassification of their category of benefits under the Plan. Plaintiff alleges that each of the Defendants breached their fiduciary duties to the players who are participants in the Plan with respect to the disclosures that should have been provided about the terms of the Plan. On behalf of himself and all other situated, plaintiff seeks to ensure that players are given proper disclosures and comply with their fiduciary duties so that they can protect themselves and avail themselves of all available benefits as required under ERISA.

Specifically, the Complaint asserts five causes of action. Count I alleges a claim for violation of ERISA § 102(a), 29 U.S.C. § 1022(a) against the Retirement Board for the SPD's failure to be written accurately and comprehensively in a manner to reasonably apprise the participants of their rights and obligations under the Plan. Count II is brought against the Board Defendants and alleges that they breached their fiduciary duties under ERISA § 404(a)(1)(A) & (B), 29 U.S.C. § 1104(a)(1)(A) & (B), in failing to make sufficient disclosures to participants about their benefits. This claim alleges that the Board Defendants failed to communicate sufficient

information about the standard to obtain reclassification under the Plan. Count III alleges that the Management Council and Players Association are fiduciaries because they had the power to appoint and remove members of the Board and therefore had a duty to monitor their appointees. Count III then alleges that the Management Council and Players Association failed to properly monitor their respective appointees and failed to take appropriate action in response to and to remedy the breaches by the Retirement Board. Count IV seeks relief from all defendants under ERISA § 502(a)(3) and 29 U.S.C. § 1132 (a)(3), to ensure that his rights and benefits are and will be determined under the Plan in effect when they became eligible for benefits and, as necessary, to have the Plan reformed accordingly and/or receive injunctive relief requiring administration of the Plan in a manner consistent with the terms of the Plan in existence at the time they became eligible for benefits. Count V seeks a determination that the Plan's statute of limitations provision which sets limitations that contradict that set forth by ERISA and is therefore void.

The fundamental flaws with Defendants' motions are that they attempt to apply an incorrect standard on a motion to dismiss, attempt to rewrite the allegations of the complaint, and improperly to draw inferences in their favor and against Plaintiff. Contrary to Defendants' mischaracterizations of the Complaint, it more than adequately sets forth factual allegations that support the legal claims. As all of claims in the Complaint more than meet the requirements of Rule 8, are timely filed, and plaintiff has standing to assert such claims, Defendants' motion should be denied.

FACTUAL ALLEGATIONS

The Plan is an employee pension benefit plan within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A) that has been established to offer both retirement benefits and disability benefits to its participants. Compl. ¶ 1.[1] Many former NFL players who are participants in this Plan suffer from debilitating neurological conditions that stem from their years of punishing play in the NFL and these conditions impact their cognitive abilities in addition to rendering them disabled from employment. *Id.* ¶¶ 3, 54. The evidence of prevalent neurological illness in former players is overwhelming, with one study showing 110 out of 111 brains of former NFL players exhibited signs of Chronic Traumatic Encephalopathy (CTE). *Id.* ¶ 3. The cognitive difficulties that these conditions inflict upon the players, in combination with the difficulty in arriving at a conclusive diagnosis to explain their symptoms, means that victims of NFL League-related head trauma may experience years of debilitating and disabling symptoms before a conclusive diagnosis can be made. *Id*. ¶¶ 2-3. Despite the vulnerable condition of the players who are participants,[2] Defendants have failed to ensure that the players were provided adequate disclosures about critical Plan terms in language that they could understand so that they could take adequate steps to protect their rights to receive the appropriate level of disability benefits. *Id.* ¶ 4. Specifically, the

[1] The written instrument of the Plan within the meaning of ERISA § 402(a) was most recently amended and restated in 2009 (often referred to as "the Plan Document"). Compl. ¶ 21. This Plan applies to disability benefits for claims filed prior to January 1, 2015. *Id.* There is no dispute that Plaintiff is a participant in this Plan and this Plan is the one that governs his disability benefits.

[2] Information about the effect of head trauma in former players has been widely available to the defendants and indeed has featured prominently in the ongoing NFL concussion class litigation. *In Re: National Football League Players' Concussion Injury Litigation*, under which the NFL accepted liability for some (neurocognitive impairment/dementia, Parkinson's Disease, Alzheimer's, ALS and Death with CTE), but by no means all, concussion-related neurological disorders, made abundantly clear the scope, prevalence and effect of these concussion injuries among former players. 821 F.3d 410, 423 (3d Cir. 2016).

Complaint alleges that Defendants adopted undisclosed interpretations of key terms of the Plan, which are contrary to the plain meaning of those terms as understood by the average participant. *Id.* In fact, the Summary Plan Description ("SPD"), which is the primary document provided to player-participants to inform them about their benefits, specifically discouraged players from engaging counsel to seek benefits under the Plan. *Id.* As a result, these players disabled by League-related head trauma have been left with one hand tied behind his back as they attempts to navigate a web of hidden terms and interpretations by the Retirement Board. *Id.* ¶¶ 4-5. The consequence of them doing so is that they jeopardize or at least undermine their ability to seek a classification for a different categories of benefits. *Id.* ¶ 5. Despite the Board Defendants claiming in their motion that they have had their interpretations not disclosed in the SPD for more than six years, the NFL Players Association and NFL Management Council have stood by and done nothing to monitor the Retirement Board as it has failed to discharge its duties to the players.

The Benefits Provided by the Plan

The Plan provides different benefit levels with largely divergent compensation rates depending on whether the player's injuries can be shown to be related to playing football. Compl. ¶ 2. Article 5.1 of the Plan provides for four categories of benefits that offer substantially different monthly benefit rates depending on which of the benefit criteria are met. *Id.* ¶ 25.[3] Of most concern is the difference between the Inactive and Football Degenerative levels of disability under the Plan.

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[3] *Solomon v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 2016 WL 852732, at *7 (D. Md. Mar. 4, 2016). The Plan provides disability benefits to, among others not here relevant, retired players like Solomon who became TPD as a result of their football career and are thus unable to work T and P benefits. The level of benefits paid varies depending upon when the player's disability manifested. For example, "Football Degenerative" benefits are paid for disabilities stemming from a player's football career that manifest within 15 years of retirement; *See* Plan Section 5.1(c), AR 023. Lesser "Inactive" benefits are paid for disabilities not stemming from a player's football career, or if stemming from a player's football career, that did not manifest within 15 years of retirement. *See* Plan Section 5.1(d).

"Inactive" Total & Permanent Disability (T and P) benefits will have (as of 2016) monthly payments of $4,166.50 a month versus $10,250.00 a month for disability related to football under the Football Degenerative level. *Id.* ¶ 25.

The Plan allows for players to seek benefits for a one benefit level and then later apply for a different benefit level through its Reclassification terms. In seeking benefits, an initial determination is made by an Initial Claims Committee. Compl. ¶¶ 28, 36. Adverse decisions are then appealable to the Retirement Board who makes the final administrative determination. *Id.*

The Fiduciaries of the Plan

The Retirement Board is designated in Article 1.3 of the Plan Document as the designated Plan Administrator of the Plan within the meaning of ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A), and a named fiduciary of the ESOP within the meaning of ERISA § 402, 29 U.S.C. § 1102. Compl. ¶ 13. Under Article 8.2 of the Plan Document, the Retirement Board was responsible for the following: defining the terms of the Plan and Trust; construing the Plan and Trust; reconciling any inconsistencies in the definition or interpretation of the Plan and Trust; deciding claims for benefits; paying all reasonable and necessary expenses of the Plan; adopting procedures, rules, and forms; delegating authority as necessary in administration of the Plan; selecting Trustees and setting forth terms of the Trust; commencing or defending suits or legal proceedings involving the Plan and the Trust; and settling, compromising, or submitting to arbitration for claims, debts, or damages due or owing to or from the Plan or Trust. *Id.* ¶ 13. As a result of these positions, responsibilities and activities, the Retirement Board and its individual members are and have been fiduciaries of the Plan under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). *Id.* ¶ 13-19. The Board and its members are referred to as the Board Defendants. *Id.* ¶ 20. The Board Defendants do not dispute their status as fiduciaries or their roles and responsibilities as described in the Complaint.

The National Football League Players Association (the "Players Association") is the labor organization representing the professional American football players in the National Football League. Compl. ¶ 12. The National Football League Management Council (the "Management Council") is a non-profit association of clubs of the National Football League that is based in New York City. *Id.* ¶ 11. Pursuant to Articles 8.1 and 10.2 of the 2009 Plan Document, the Management Council when acting jointly with the Players Association had the power to amend the Plan. *Id.* ¶¶ 11-12. The Players Association had the authority to and did appoint three of the six members of the Retirement Board and also had the authority to remove and replace any of those three members. *Id.* ¶¶ 12 13. Likewise, the Management Council had the authority to and did appoint the other three members of the Retirement Board, and the authority to remove and appoint a replacement for any member of the Retirement Board that the NFL Management Council has appointed. *Id.* ¶¶ 11, 13. As a result of their authority to remove and replace their respective appointees on the Retirement Board, the Complaint alleges that the Management Council and the Players Association were fiduciaries of the Plan within the meaning of ERISA. Compl. ¶¶ 11-12.

<u>The Summary Plan Description & Disclosures About The Plan Terms</u>

As the plan administrator, the Retirement Board is required to disclose information about the Plan to the player-participants. Compl. ¶ 13. The SPD serves as the primary document designed to communicate information to the player-participants about the Plan. *Id.*; 29 U.S.C. § 1022. As the designated plan administrator, the Retirement Board was responsible for ensuring that the SPD met the requirements of ERISA § 102 and the DOL Regulations. *Id.* ERISA § 102 and the DOL Regulations set forth specific requirements about how the Plan terms need to be communicated to participants. *Id.* ¶¶ 68-69. Both ERISA § 102 and the DOL Regulations implementing ERISA § 102, 29 C.F.R. § 2520.102-2(a), require that the SPD "shall be written in

a manner calculated to be understood by the average plan participant and shall be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan." *Id.* ¶¶ 68-69. The DOL Regulations further specify that in order to fulfill these requirements, the plan administrator must "tak[e] into account such factors such as the level of comprehension and education of the *typical participants in the plan* and the complexity of the terms of the plan." *Id.* ¶ 69. The DOL Regulations further explain that in order to make the SPD understandable to the average participant, the SPD "will usually require the limitation or the elimination of technical jargon and of long, complex sentence. . .[and] the use of clarifying examples and illustrations." *Id.* The Complaint alleges that the SPD did not meet these requirements. *Id.* ¶¶ 68-79. Specifically, the Complaint alleges that the SPD failed to define or explain terms, used legal jargon and then adopted an undisclosed interpretation of these terms that was contrary to the plain and ordinary definitions as understood by the average participant in this Plan. *Id.* ¶¶ 70-77. And the SPD discouraged players from retaining a lawyer to assist them through the benefit process. *Id.* ¶ 78. Additionally, the Board Defendants had fiduciary duties under ERISA § 404(a)(1)(A) and (B) to make disclosures beyond those specifically required by ERISA. *Id.* ¶¶ 81-88.

Neither the SPD nor any other communication (until the final denial on a request for reclassification) explained the process of Reclassification under the Plan. Compl. ¶¶ 30, 71-77. Article 5.5(b) of the Plan addresses reclassification: "A Player who becomes totally and permanently disabled and who satisfies the conditions of eligibility for benefits under Section 5.1(a), 5.1(b), 5.1(c), or 5.1(d) will be deemed to continue to be eligible only for the category of benefits for which he first qualifies, unless the Player shows by evidence found by the Retirement Board or the Disability Initial Claims Committee to be clear and convincing that, because of

changed circumstances, the Player satisfies the conditions of eligibility for a benefit under a different category of total and permanent disability benefits. *Id.* ¶ 28. Neither Article 5.5(b) of the Plan nor any part of the SPD provides any definition or explanation as to what is meant by "clear and convincing evidence" or "changed circumstances." Compl. ¶¶ 28, 30, 71-77. The SPD terms provide no explanation to the players, at least in terms that the average participant would understand, as to what the Board means by "changed circumstances," offering only:

> As long as you remain totally and permanently disabled, you will continue to receive total and permanent disability benefits under the category for which you first qualify, unless you present evidence for reclassification that the Disability Initial Claims Committee or the Retirement Board finds to be clear and convincing. You must be able to demonstrate that, because of change of circumstances, you satisfy the conditions of eligibility for a benefit under a different category of total and permanent disability benefits.

Id. ¶ 30. The average participant of this Plan (who is disabled and likely affected by head trauma) who has been initially classified at a lower tier of benefits would understand that this language to convey that it would be possible to seek Reclassification through establishing "changed circumstance."

The players are also not informed that the Board has adopted a hidden definition for "changed circumstances" that is only made known to the players at the very end of the administrative process, in their final decision. Compl. ¶¶ 38-39. The counterintuitive definition adopted by the Retirement Board is:

> Section 5.55(b) governs requests for reclassification such as yours, and it permits reclassification of T&P benefits only where a Player provides "clear and convincing" evidence of "changed circumstances" warranting "a different category of total and permanent disability benefits." In this and all other instances, the Retirement Board interpret Section 5.5(b)'s "changed circumstances" requirement to mean a change in Player's physical condition—such as a new or different impairment—that warrants a different category of benefits.

Id. ¶ 38.

Despite the complexity of the Plan, the SPD issued by the Board actively discouraged players from seeking legal representation since at least the April 2013 SPD:

> The application forms have been streamlined and you should find them easy to complete. If you have any questions, you can call the Plan Office and ask for assistance. If you wish, the staff will fill out the application as you direct and send it to you for your signature.
>
> You are entitled to retain an attorney or advisor should you wish to do so for any reason. ***However, many attorneys demand a significant portion of your disability benefits just to file the initial application.***

Compl. ¶¶ 29 (emphasis added).

Further, 5.2(b) of the Plan establishes on method of creating a presumption of T and P benefits is through the award of Social Security Disability benefits within 15 years of a player's last year of League play. Compl. ¶ 26 (citing *Solomon,* 2016 WL 852732, at *10-11). Despite, the presence of 5.2(b), the SPD does not explain the effect in time that could occur if they seek Social Security benefits after having first sought T and P benefits under the plan. *Id.* ¶¶ 29-30.

Chris Hudson's Experience Applying for Benefits

After 8 years playing in the League, Mr. Hudson sustained numerous head injuries. Compl. ¶ 31. Just two years after his 2003 retirement from the NFL, in 2005, Hudson began complaining of headaches, dizziness, ringing ears and blurry vision. *Id.* By 2008, these symptoms worsened to the point that Mr. Hudson experienced increased anxiety, poor decision making, inability to sit still for long periods of time, sleep problems, decreased ability to concentrate, social withdrawal, memory problems and increased occurrence of headaches and light sensitivity. *Id.* Mr. Hudson applied for benefits under the Plan and, ultimately, in a May 20, 2011 the Retirement Board reversed its prior denial of Hudson's T & P benefits for Inactive T & P benefits. *Id.* ¶ 32. However, in so doing, it made a determination that the disabling injuries suffered by Mr. Hudson were "not related to League football activities." *Id.* ¶ 33.

Mr. Hudson then sought Social Security Disability benefits and was awarded these benefits with a disability date of December 31, 2009. Compl. ¶ 34. After receiving the decision from Social Security, Mr. Hudson sought Reclassification under the Plan asserting that his SSDI award and other new medical documentation established changed circumstances by clear and convincing evidence. *Id.* ¶ 35. He was subsequently denied by the Initial Claims Committee which never explained its definition of "changed circumstances" or how it weighed the evidence submitted by Hudson for its consideration. *Id.* ¶ 36. In its denial, the Initial Claims Committee also notified Hudson of his right to appeal as well as his ability to "submit written comments, documents and any other information that you believe shows you qualify for these benefits." *Id.* On March 21, 2015, Hudson appealed this decision and included numerous pieces of new supporting medical evidence. *Id.* ¶ 37. On May 21, 2015, the Board issued a Final Decision, received by Hudson on May 27, 2015. *Id.* ¶ 38. For the first time in this final decision, the Board notified Hudson of its interpretation of "changed circumstances" under the Plan. *Id.* ¶¶ 38-39.

ARGUMENT

I. DEFENDANTS MISAPPLY THE PLAUSIBLITY STANDARD

Each of the three Defendants' motions in this case argue that Plaintiff's claims are "not plausible" or are "implausible" under the Supreme Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). ECF No. 57 at 6-7; ECF No. 53 at 6, 14; ECF No. 62 at 13-14. Indeed, the Retirement Board Defendants expend four pages denigrating the theory of the Complaint as implausible. ECF No. 57 at 6-10. Yet their arguments are based on a misunderstanding of the term "plausible" as used by the Supreme Court and the Second Circuit in evaluating Complaints on a motion to dismiss.

The Second Circuit has explained that "to present a plausible claim at the pleading stage, the plaintiff need not show that its allegations … are more likely than not true." *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 184 (2d Cir. 2012) (reversing dismissal). "[P]lausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible." *Id.* (citing *Anderson v. Bessemer City,* 470 U.S. 564, 575 (1985) (explaining "two or more witnesses" may tell mutually inconsistent but "coherent and facially plausible stor[ies]")). "The choice between or among plausible inferences or scenarios is one for the factfinder" and "is not a choice to be made by the court on a Rule 12(b)(6) motion." *Id.* (citing *Todd v. Exxon Corp.,* 275 F.3d 191, 203 (2d Cir. 2001)). As a result, "[a] court ruling on such a motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible." *Id.* at 185. In determining whether a complaint states a claim that is plausible, the court is required to proceed "on the *assumption that all the [factual] allegations in the complaint are true.*" *Twombly,* 550 U.S. at 555 (emphasis added). Even if the plausibility of the truth of the seems doubtful, "Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations." *Id.* at 556. "Given that the plausibility requirement '*does not* impose a *probability* requirement at the pleading stage,' the *Twombly* Court noted that 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely.'" *Anderson News*, 680 F.3d at 185; *Ott v. Fred Alger Mgmt., Inc.*, 2012 WL 4767200, at *6 (S.D.N.Y. Sept. 27, 2012) ("While other inferences from the facts also may be plausible, a court 'may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible.'") Ignoring these standards, the Board Defendants argue that "the overarching reason"

that the Complaint's "allegations do not pass muster" is "because they defy common sense." ECF No. 57 at 6-7.

Underlying the Board Defendants' argument is the assumption that "Hudson and other players would never have applied for or accepted disability benefits if only the SPD had disclosed additional information about the Board's interpretation of the Plan's reclassification provision." ECF No. 57 at 6. To support this argument, they cite paragraphs 3-5 of the Complaint, but none of these paragraphs make such an allegation: Paragraph 3 discusses CTE; Paragraph 4 discusses the Retirement Board's failure to disclose the perils faced by players who seek benefits without clear diagnoses and/or counsel; and Paragraph 5 alleges that these failures cause a trap for the unwary players. Nowhere in these paragraphs does plaintiff allege that plaintiff and the class would never have applied for benefits if there had been proper disclosure by the SPD. Thus, Defendants' assertion is based on assumptions not found in the Complaint.

Defendants themselves recognize that the court must accept factual allegations as true and draw "all reasonable inferences in favor of plaintiff." ECF No. 57 at 6 (quoting *Salveson v. J.P. Morgan Chase & Co.*, 663 Fed. App'x 71, 74 (2d Cir. 2016)). A reasonable inference, the one that is alleged in the Complaint, is that the players would have done things differently, *i.e.*, get a diagnosis and seek counsel, not that they would not have applied at all. Thus, the Board Defendants attempt to improperly draw inferences against Plaintiff.

The Board Defendants argue, without any support, that because the players are likely unemployed, they are willing to face the uncertainties. ECF No. 57 at 7. This assumption is untied to anything in the Complaint What defies common sense is Defendants' argument that the players would disregard what is explicitly set forth in the SPD, including, that no counsel is needed. *See* Compl. ¶¶ 4, 78, 93, 94. It also defies common sense that the undefined term, "changed

circumstances" means anything other than what it says, a change in circumstances. *Id.* Rather, as Defendants' own authority explains, it is entirely reasonable for the participants to expect that the SPD and Plan mean what it says, expressed in ordinary language that the average participant can understand. *See Amara v. Cigna Corp.*, 925 F. Supp. 2d 242, 253 (D. Conn. 2012), *aff'd*, 775 F.3d 510 (2d Cir. 2014). Contrary to the Board Defendants' arguments, the Complaint does not allege that a player would delay an application in the hope of a "scientific break-through." ECF No. 57 at 8. Rather, the Complaint alleges that Defendants' conduct and lack of adequate disclosures prevented them from availing themselves of the advances in technologies based on self-serving interpretations of Plan terms. Compl. ¶¶ 89-94. The reasonable inference is that a player would have done things differently not that they would have done nothing. But as a result of Defendants' breaches of fiduciary duty, the players were unwittingly bound by early classifications without proper assistance which the SPD specifically encouraged. Defendants' attempt to avoid this by creating their own version of the Complaint and the use of unsupported assumptions is improper.

The Board Defendants also argue that the allegations of Count I and II eventually require a showing of actual harm. ECF No. 57 at 10. Yet, the Board Defendants' own case (involving harm under the First Amendment) itself explains that causation and harm can be established indirectly or by circumstantial evidence. *Loren v. N.Y City Dep't of Educ.*, 2015 WL 3917490, at *6-7 (S.D.N.Y. June 25, 2015). More importantly, for purposes of this motion, Counts I and II explicitly allege that Plaintiff and the Class were harmed by Defendants' inadequate disclosures. Compl. ¶¶ 80, 88.

As another court in this District faced with similar arguments explained: "Defendants' 'implausibility' argument barely deserves mention, but it will suffice to say that nowhere in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), does the Supreme Court teach that a court deciding a

motion to dismiss has the power to decide for itself that explicitly pled factual allegations … do not deserve to be taken as true simply because they seem implausible." *Athineos v. Andromeda Inv. Co.*, 2013 WL 6183112, at *1 (S.D.N.Y. Nov. 20, 2013). Similarly, in *Luv N' Care, Ltd. v. Shiboleth LLP*, 2017 WL 3671039, (S.D.N.Y. Aug. 8, 2017), the court rejected a similar argument by explaining: "While the Defendants may vehemently contest the validity of Plaintiffs' allegations, a motion to dismiss is not the proper avenue for raising these factual challenges." *Id.* at *11. Such arguments should similarly be rejected here and the Complaint should be evaluated as to whether it sufficiently alleges these claims. When viewed under the proper standard, Defendants' motions should be denied.

II. COUNT I SUFFICIENTLY ALLEGES A VIABLE CLAIM UNDER ERISA § 102

Count I alleges that the Retirement Board and its members, as the Plan Administrator, violated ERISA § 102, 29 U.S.C. § 1022, by creating and distributing an SPD that did not comply with ERISA § 102(a) and the DOL Regulations in explaining what was necessary for reclassification under the Plan. Compl. ¶¶ 67-80. Count I explains that the SPD improperly used unexplained legal jargon that differed from the ordinary definition of those terms as understood by the average participant in this Plan. *Id.*, ¶¶ 71-72, 74-76. Count I alleges that Hudson did not discover that the Board was "not using the plain and ordinary definition[s] for the[se] terms" until "after his claim for benefits requesting a reclassification." *Id.*, ¶¶ 73, 77.

A. Count I Alleges That The SPD Violated ERISA § 102

The Board Defendants argue that the SPD complied with ERISA § 102 and the DOL Regulations and argue that Count I "alleges the SPD should have done more than" ERISA § 102 requires. ECF No. 57 at 12. But this ignores the relevant portions of the regulations and the case law and also contradicts the allegations of the Complaint.

"SPDs are central to ERISA." *Frommert v. Conkright*, 738 F.3d 522, 531 (2d Cir. 2013). The SPD serves as an "employee's primary source of information regarding employment benefits and employees are entitled to rely on the descriptions contained in the summary." *Burke v. Kodak Ret. Income Plan,* 336 F.3d 103, 110 (2d Cir. 2003). ERISA § 102 and the associated DOL regulations govern the contents of SPDs. *Id.* Significantly, ERISA § 102 requires that the SPD must explain the plan's eligibility requirements as well as "the circumstances which may result in disqualification, ineligibility or denial or loss of benefits." *Id.* (citing 29 U.S.C. § 1022(b) and 29 C.F.R. § 2520.102–3(*l*)). To comply with ERISA, these explanations in "[t]he SPD must be written in a manner calculated to be understood by the average plan participant and must be sufficiently accurate and comprehensive to apprise participants and beneficiaries of their rights and obligations under the plan." *Id.* (quoting 29 U.S.C. § 1022(a)). The standard is not a *hypothetical* "average plan participant" but needs to "account" for "the level of comprehension and education of *typical participants in the plan* and the complexity of the terms." 29 C.F.R. § 2520.102–2(a) (emphasis added). The SPD also must limit or avoid "technical jargon" and include "clarifying examples and illustrations" of how the plan works in practice. *Id.* Contrary to Defendants' assertion, Count I alleges that the SPD failed to comply with these standards, and not any higher standard. Compl. ¶¶ 68-69, 79. Count I explicitly alleges the specific language in the SPD that constituted legal jargon, how the ordinary definition of these terms differed from Defendants' interpretation and that the SPD failed to provide any examples or illustrations of these standards in practice. *Id.* ¶¶ 71-77. In addition, Count I explains how the SPD itself "specifically discouraged participants from hiring an attorney" to assist them from applying for benefits (a fact

Defendants ignore). *Id.* ¶ 78. These allegations are sufficient to state a claim for a violation of ERISA § 102.[4]

Ignoring the standards under ERISA § 102 and the allegations of the Complaint, the Board Defendants suggest that mere repetition of the language in the formal written instrument satisfies the disclosure requirement for the SPD. ECF No. 57 at 13. Yet that ignores that the SPD is supposed to describe the plan (and modifications) in readily understandable form. *CIGNA Corp. v. Amara*, 563 U.S. 421, 437 (2011). The Second Circuit has repeatedly held that the SPD needs to do more than simply repeat the terms of the plan that appear in the formal, legalistic written instrument, but instead "an SPD must explain the 'full import' of a plan term." *Frommert*, 738 F.3d at 532 (affirming finding that SPD failed to provide adequate notice of the plan's offset method); *Layaou v. Xerox Corp.*, 238 F.3d 205, 210-11 (2d Cir. 2001) (reversing summary judgment for defendants because "SPD failed to provide adequate notice" about the calculation of retirement formula); *Amara v. CIGNA Corp.*, 534 F. Supp. 2d 288, 345 (D. Conn. 2008) ("[I]n addition to describing the individual provisions of the retirement plan and their import, an employer must also describe the interaction among those provisions if the result is likely to be material to plan participants."); *see Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032 (2d Cir. 1985) (finding notice failed to disclose how employees' benefits would be affected by plan amendment). As Defendants' own authority explains, the regulations impose an "affirmative duty to make participants clearly 'see' circumstances under which they will *not*

[4] Defendants cite *Robinson v. Sheet Metal Workers Nat'l Pension Fund*, 441 F. Supp. 2d 405 (D. Conn. 2006) to suggest that the Complaint does not sufficiently allege deficiencies in the SPD. ECF No. 57 at 14-15. Not only do Defendants rely on an incorrect standard on a motion to dismiss, but *Robinson* was a trial decision decided on a stipulated record. *Robinson*, 441 F. Supp. 2d. at 411. While the *Robinson* court found that plaintiffs had failed to show any misleading statements and the language was clear, Count I specifically alleges how specific language failed to meet the standards of ERISA § 102 and the DOL Regulations. *Supra* II.A.

receive the benefits described in the summary that they might otherwise reasonably expect to receive." *Osberg v. Foot Locker, Inc.*, 138 F. Supp. 3d 517, 554 (S.D.N.Y. 2015), *aff'd*, 862 F.3d 198 (2d Cir. 2017). To have an SPD that provides sufficient explanation, the plan administrator must "exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan." *Frommert*, 738 F.3d at 532 (quoting 29 C.F.R. § 2520.102–2(a)). The Complaint adequately alleges that the Board Defendants, as the plan administrator, failed to provide such an explanation to the participants here who are suffering brain damage as a result of playing for the NFL. Compl. ¶¶ 67-80.

Ignoring those standards, the Board Defendants suggest they had no duty to disclose their administration and interpretation of plan terms. ECF No. 57 at 12-13.[5] Defendants assert that no case imposes a requirement that a policy not explicitly contained in the written instrument must be disclosed. *Id.* at 13. Yet, they conveniently ignore that the Second Circuit rejected precisely that argument in *Wilkins v. Mason Tenders Dist. Council Pension Fund*, 445 F.3d 572 (2d Cir. 2006).[6] At issue in *Wilkins* was "whether ERISA requires that a practice not mentioned in the SPD be included in the SPD" and the practice involved how the fiduciaries interpreted and administered

[5] A plan administrator only has authority to interpret ambiguous terms (and only where the plan itself provides the plan administrator with deference to interpret such terms). *Buckley v. Slocum Dickson Med. Group, PLLC*, 585 Fed. App'x 789, 793 (2d Cir. 2014) (unpublished); *O'Neil v. Ret. Plan for Salaried Emps. of RKO Gen.*, 37 F.3d 55, 58–59 (2d Cir.1994). To the extent that Defendants are suggesting that the disputed terms are ambiguous, that means the terms are necessarily capable of at least two meanings. *See id.* As such, Defendants can hardly argue that merely repeating these ambiguous terms in the SPD without further explanation provided sufficient disclosure of how those ambiguous terms applied, particularly given that they argue that they have applied the same interpretation for more than 6 years. ECF No. 57 at 12-13.

[6] Defendants ignored that their own case discussed *Wilkins. McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 199-200 (2d Cir. 2007) (discussing *Wilkins*).

the plan. *Id.* at 582. Like here, the practice was not contained in the written instrument (*i.e.*, the plan document). *Id.* The *Wilkins* defendants argued and the district court found that because this practice or policy "was not a plan term, but 'merely a statement as to how the Pension Fund administers claims for benefits,' disclosure of the Policy was not required." *Id.* at 581. The Second Circuit reversed and unambiguously held that the fiduciaries were "required under ERISA to state its Policy [of interpretation and administration of the plan] in the SPD." *Id.* at 583–84. Applying the standards under the DOL Regulations, the Second Circuit concluded: "It seems to us obvious that the Policy, by erecting an additional, mandatory prerequisite to the receipt of promised benefits, may result in disqualification, ineligibility, or a denial or loss of benefits [and] must, therefore, be disclosed in the SPD." *Id.* at 584.[7] The Complaint here similarly alleges that the Board Defendants imposed a policy or practice to interpret certain terms in the Plan related to reclassification in a particular way, but failed to disclose their policy or practice of interpretation. Compl. ¶¶ 75, 77. Defendants do not deny that such a practice existed but argue that it has existed for more than six years. ECF No. 57 at 16-17. Thus, Count I appropriately alleges a violation of ERISA § 102 that is not novel, but based on well-established Second Circuit precedent.[8]

[7] Defendants rely on cases which simply rejected claims that defendants were required to disclose in the SPD matters *unrelated to the conditions* that would affect whether plaintiff would qualify for benefits. *E.g.*, *McCarthy*, 482 F.3d at 195 (finding SPD did not have to disclose the specific method of actuarial reduction); *Lee v. Verizon Commc's, Inc.*, 954 F. Supp. 2d 486, 491 (N.D. Tex. 2013) (finding SPD did not have disclose the source of the benefits).

[8] Defendants assert that it would be impractical for them to have to explain how plan terms will be interpreted in the SPD. ECF No. 57 at 14. Yet, Defendants simultaneously assert that Plaintiff should have been on notice of a prior interpretation. *Id.* at 10. ERISA requires plan administrators to treat all similarly situated participants in a consistent manner. *Alday v. Raytheon Co.*, 619 F. Supp. 2d 726, 736 (D. Ariz. 2008) (citing *John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan,* 26 F.3d 360, 370 (2nd Cir.1994)), *aff'd*, 620 F.3d 1219 (9th Cir. 2010). Defendants' own authority recognizes that plan administrators have a duty to interpret plan terms consistently. *Boyd*, 796 F. Supp. 2d at 693. Thus, there is nothing impractical to require a plan administrator to explain ambiguous terms in the SPD

B. Count I Pleads A Timely Claim Under ERISA § 102

The Board Defendants also argue that Count I is "barred by the statute of limitations." ECF No. 57 at 10. In making this argument, however, Defendants ignore the standard to succeed on statute of limitations on a motion to dismiss and obscure that Count I is timely whether analyzed under a three year statute of limitations or the correct six year statute of limitations.

1. Defendants Fail to Establish That Plaintiff's ERISA § 102 Claim is Time-Barred From the Face of the Complaint

"The statute of limitations is an affirmative defense as to which defendants bear the burden of proof." *Trs. of the New York City Dist. Council of Carpenters Pension Fund v. Lee*, 2016 WL 1064616, at *9 (S.D.N.Y. Mar. 14, 2016) (citing *Harris v. City of New York*, 186 F.3d 243, 251 (2d Cir. 1999) and denying motion to dismiss in ERISA case on statute of limitations grounds). As a plaintiff "need not include such allegations" in his complaint that anticipate and rebut a statute of limitations defense, "dismissal is appropriate only if a complaint clearly shows the claim is out of time." *Harris*, 186 F.3d at 250-51. To succeed on a motion to dismiss involving an affirmative defense, defendants must "identify, from the face of the complaint and taking all inferences in [plaintiff's] favor, the precise moment at which the [] limitations began to run" because plaintiff had sufficient information that would enable plaintiff "to state his own viable claims." *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 95 (2d Cir. 2018) (reversing dismissal). Relying on *Harris*, another court in this District concluded in an ERISA case that an allegation in the complaint denying that plaintiff had knowledge sufficed to defeat defendants' motion to dismiss on statute of limitations grounds despite defendants submitting purportedly contrary extraneous materials. *Lee*, 2016 WL 1064616, at *10-11; *see also Sachdev v. Singh*, 2016 WL 768861, at *9

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that will affect many, if not all, participants, as required by ERISA § 102, in language that the average participant will understand.

(S.D.N.Y. Feb. 26, 2016) (denying motion to dismiss based on purported constructive knowledge where there was no allegation in the complaint about when plaintiff acquired knowledge). Illustrating that this issue is not appropriate for a motion to dismiss, the Board Defendants' sole authority from this District or involving claims under ERISA was decided on summary judgment. ECF No. 57 at 10 (citing *Osberg v. Foot Locker, Inc.*, 907 S. Supp. 2d 527 (S.D.N.Y. 2012) (deciding issue on summary judgment)).[9]

Ignoring the procedural posture of the case and the standard from the Second Circuit, Defendants attempt to rely on extraneous material to contradict the allegations of the Complaint. ECF No. 57 at 11. Defendants ignore that the Complaint alleges that Plaintiff "discovered that the Board Defendants were not using the plain and ordinary definition for the terms" in the Plan, "but were using legal jargon." Compl. ¶¶ 73, 77. And Plaintiff alleges that the Board did not disclose its specific interpretation until 2017. *Id.* ¶ 77. In an improper attempt to rebut that allegation, Defendants suggest that Plaintiff should be charged with constructive knowledge of a decision issued in *another case* involving *another player*. ECF No. 57 at 11 (citing *Boyd v. Bell*, 796 F. Supp. 2d 682 (D. Md. 2011)). By arguing that Plaintiff "was on constructive notice of the Board's interpretation *from the moment of that decision,*" Defendants assert that Plaintiff's claim expired three years from the date of the *Boyd* decision (*i.e.*, May 24, 2011), or by May 24, 2014. *Id.* According to Defendants, the statute of limitations on Plaintiff's ERISA § 102 claim *expired* even before he filed his *own claim* for benefits seeking reclassification on September 16, 2014. *Compare id. with* Compl. ¶ 35. But Defendants cite *no case* finding that a plaintiff has constructive

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[9] Of Defendants' other two authorities, *Hutton v. Deutsche Bank AG*, 541 F. Supp. 2d 1166 (D. Kan. 2008) not only did not apply Second Circuit law but did not involve ERISA claims; and *Vay v. Huston*, 2015 WL 4461000 (W.D. Pa. July 21, 2015) did not even involve a motion to dismiss or address statute of limitations.

knowledge of his own claim based on a plan administrator's decision involving *another participant* or a district court decision finding that the decision was not an abuse of discretion. *See id.*[10] Regardless of the appropriate time period, the Second Circuit has held that a plaintiff's ERISA cause of action accrues and the statute of limitations does not begin to run until "there has been 'a repudiation by the fiduciary which is *clear* and made known to the beneficiaries.'" *Miles v. New York State Teamsters Conf. Pension & Ret. Fund Emp. Pension Ben. Plan*, 698 F.2d 593, 598 (2d Cir. 1983) (quoting *Valle v. Joint Plumbing Indus. Bd.*, 623 F.2d 196, 202 n.10 (2d Cir. 1980)). Indeed, the Second Circuit rejected an argument similar to the one made by Defendants here. *Osberg v. Foot Locker, Inc.*, 862 F.3d 198, 208 (2d Cir. 2017) (rejecting argument reviewing trial decision). Here, the Complaint alleges that the May 21, 2015 denial of Plaintiff's appeal on reclassification was the first time that the Board had provided an explanation to Hudson of how the Board interprets "changed circumstances" and that explanation was "never conveyed to Hudson in any way prior to the final denial." Compl. ¶ 39. Nothing submitted by Defendants contradicts that allegation.[11] As Plaintiff filed this Complaint within *three years* of that appeal

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[10] Not all courts have agreed that the Board's interpretation of the definition of changed circumstances is consistent with the Plan. *E.g.*, *Solomon*, 2016 WL 852732, at *7 (rejecting the Board's interpretation of the plan relating to changed circumstances under the Plan), *aff'd*, 860 F.3d 259 (4th Cir. 2017). Thus, the Board suggests that Plaintiff should be deemed to have constructive knowledge of all decisions and also the prescience to predict the outcome of his own case.

[11] Most tellingly, despite now claiming that the interpretation of the Plan set forth in the *Boyd* decision dictated the result for Plaintiff's request for reclassification, the Board forgot to mention anything about its prior determination in its October 8, 2014 denial of Hudson's request for reclassification. Compl. ¶ 36. The Board did not mention its prior *Boyd* decision in its May 21, 2015 denial of his appeal on reclassification. Compl. ¶ 38. Copies of the October 8, 2014 denial and May 21, 2015 denial of the appeal are annexed to the Declaration of Daniella Quitt dated October 30, 2018 filed concurrently with this brief.

denial, Plaintiff's ERISA § 102 claim is undisputedly timely even under a three year statute of limitations.

2. Count I is Timely Under the Applicable Six Year Statute of Limitations

The Board Defendants unequivocally claim that a three-year statute of limitation applies to claims under ERISA § 102. ECF No. 57 at 10. Not only do they only cite a district court decision, but they fail to disclose that the Second Circuit has held that where "ERISA does not prescribe a limitations period for actions under § 1132, the controlling limitations period is that specified in the most nearly analogous state limitations statute" and for cases filed in New York, "the six-year limitations period provided by New York's C.P.L.R. § 213 controls." *Miles v. New York State Teamsters Conf. Pension & Ret. Fund Emp. Pension Ben. Plan*, 698 F.2d 593, 598 (2d Cir. 1983) (finding ERISA claim timely filed). Defendants' lone district court authority erroneously assumes that the Second Circuit used the six-year statute of limitations for contract actions in NY CLPR § 213(2) and further assumes that the Supreme Court's decision in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011) necessarily changed the statute of limitations analysis. *Osberg v. Foot Locker, Inc.*, 907 F. Supp. 2d 527, 533 (S.D.N.Y. 2012), *aff'd in part, vacated in part*, 555 Fed. App'x 77 (2d Cir. 2014) (unpublished). Both assumptions are wrong.

Defendants and their sole authority ignore that NY CLPR 213(1) provides a *six-year* statute of limitations for "an action for which no limitation is specifically prescribed by law." N.Y. C.P.L.R. § 213(1). As the Second Circuit specifically referenced the failure of ERISA to "prescribe a limitations period" for certain actions, the reference to NY CPLR § 213 is best understood as referring to NY CPLR § 213(1). *Miles*, 698 F.2d at 598. NY CPLR provides a six-year statute of limitation for any "action for which no limitation is specifically prescribed by law." NY CPLR § 213(1). Additionally, *Osberg*, cites *Romero v. Allstate Corp.*, 404 F.3d 212 (3d Cir.

2005) to justify its decision to depart from long-standing six-year statute of limitations set by the Second Circuit. *Osberg.*, 907 F. Supp. 2d at 533.[12] But in *Romero*, the Third Circuit held the Pennsylvania catchall statute of limitations – one similar to NY CPLR § 213(1) – applied to a disclosure violation. *Romero,* 404 F.3d at 221-22. The statute of limitations applied by the Third Circuit was similar to NY CPLR § 213(1), i.e., one that applied to claims to which no other statute of limitations applies. *Id.; see* 42 Pa. C. S. § 5527(b) ("Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531 (relating to no limitation) must be commenced within six years"). Thus, the analogous New York statute of limitations for the ERISA § 102 continues to be the six-year catchall statute of limitations in NY CPLR § 213(1).

Defendants do not suggest that Plaintiff's ERISA claim asserted in Count I is untimely under the six-year statute of limitations. As Defendants only claim that the statute of limitations began running in 2011, there can be no question that Count I is timely.

III. COUNT II ALLEGES VALID AND TIMELY BREACHES OF FIDUCIARY DUTY UNDER ERISA § 404(a)(1)(A) & (B)

Count II alleges that the Board Defendants breached their fiduciary duties under ERISA § 404(a)(1)(A) & (B), 29 U.S.C. § 1104(a)(1)(A) & (B), in failing to make sufficient disclosures to participants about their benefits. Compl. ¶¶ 81-88. Specifically, Count II alleges that the Board Defendants failed to communicate sufficient information about the standard to obtain reclassification under the Plan. *Id.*

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12 On two occasions, the Second Circuit refused to decide whether the *Osberg* district court had correctly decided that an § 102 claim was subject to a three-ear statute of limitations. *Osberg v. Foot Locker, Inc.*, 862 F.3d 198, 206 n.5 (2d Cir. 2017) (discussing *Osberg I*, 555 Fed. App'x at 80). Thus, the six-year statute of limitation remains binding authority in this Circuit.

A. Actions That Violate ERISA § 102 Can And Probably Do Also Constitute Breaches Of Fiduciary Duty Under ERISA § 404(a)

The Board Defendants claim that Count II should be dismissed by arguing that ERISA § 404 "does not impose a duty to disclose information in an SPD beyond what is already required by ERISA section 102." ECF No. 57 at 18. Essentially, Defendants argue that the same conduct cannot violate both ERISA § 102 and § 404. *Id.* In support this argument, Defendants rely exclusively on a 20-year old district court case and a Fourth Circuit decision. *Id.* In deciding what documents a participant could request on demand *pre-litigation* under ERISA, the Fourth Circuit merely decided that ERISA § 404(a)(1)(A) did not confer a right to *additional documents* other than those specified in ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4). *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 657 (4th Cir. 1996). The Fourth Circuit recognized that fiduciaries had a duty not to mislead participants and had a duty "to disclose information to beneficiaries when the trustee knows that failure to disclose might be harmful." *Id.* at 658 (citing and discussing cases). In short, *Faircloth* does not suggest that duty of disclosure is limited to what is contained in ERISA § 102, 29 U.S.C. § 1022.[13]

The Board Defendants' own Second Circuit authority (cited elsewhere in their brief) undermines their argument. In *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76 (2d Cir. 2001), the Second Circuit found that plaintiffs had viable "fiduciary duty claims under ERISA §§

[13] The discussion in *Weiss v. CIGNA Healthcare, Inc.*, 972 F. Supp. 748 (S.D.N.Y. 1997), is entirely dicta as the court found that the claim could not be brought against CIGNA because it was not the plan administrator. *Id.* at 753. Moreover, the *Weiss* court incorrectly relies on a decision about what needs to be provided pursuant to ERISA § 104(b)(4) to incorrectly assume that means that any fiduciary disclosure duties under ERISA § 404 are limited to what is expressly contained in ERISA § 102. *Id.* (relying on *Bd. of Trs. of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 146 (2d Cir. 1997) (holding merely that documents not available upon request pursuant to ERISA § 104(b)(4) were not required to be provided on demand pursuant to ERISA § 404(a)(1)).

404(a)(1)(A) & (B)" which were based on defendant's communications with participants about their benefits, including in SPDs that did not "describe[] the plan accurately." *Id.* at 87. In doing so, the Second Circuit adopted the following standard that imposed duties both on affirmative statements and omissions: "[W]hen a plan administrator affirmatively misrepresents the terms of a plan *or fails to provide information when it knows that its failure to do so might cause harm,* the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries." *Id.* at 88 (adopting the Third Circuit standard in *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1264 (3d Cir.1995) (emphasis added)). The Restatement of Trusts likewise explains that a fiduciary has "a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection." Restatement (Second) of Trusts § 173, comment d (1959).[14] The Second Circuit recently emphasized that it has "endorsed theories of liability" under ERISA § 404(a)(1) "that rest on material omissions as well as affirmative misstatements" and that a breach of fiduciary can be "based on *un*intentional misrepresentations." *In re DeRogatis,* 904 F.3d 174, 194 (2d Cir. 2018) (citing *Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5 (2d Cir. 1997) and finding sufficient evidence that the Welfare Fund fiduciaries breached their duties).[15] Finally, Defendants' own authority, among others, illustrates that

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[14] The Supreme Court has explained on multiple occasions that "an ERISA fiduciary's duty is 'derived from the common law of trusts'" and that "[i]n determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts." *Tibble v. Edison Int'l,* 135 S. Ct. 1823, 1828 (2015) (quoting in part *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transport, Inc.*, 472 U.S. 559, 570 (1985)).

[15] Numerous circuits have held that fiduciaries have "an affirmative duty to inform when the trustee knows that silence might be harmful" or disclose "those material facts known to the fiduciary but unknown to the beneficiary, which the beneficiary must know for its own protection." *Jordan v. Fed. Express Corp.*, 116 F.3d 1005, 1015 (3d Cir. 1997); *Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 548 (6th Cir. 1999) (following the Third Circuit); *Kenseth v. Dean Health Plan*,

violation of ERISA § 102 can also result in a violation of ERISA § 404 and a claim for violating ERISA § 102 does not preclude a claim under ERISA § 404. *E.g.*, *Osberg v. Foot Locker*, 138 F. Supp. 3d 517, 550-55 (S.D.N.Y. 2015) (analyzing claims under ERISA § 102 and 404 together and finding violations of both).

Nor can there be any argument that mere existence of a cause of action under ERISA § 102 somehow precludes a claim under ERISA § 404. The Second Circuit has twice rejected the argument that "there is no private action for breach of fiduciary duty under ERISA when another remedy is available under 29 U.S.C. § 1132." *Devlin,* 274 F.3d at 89; *New York State Psychiatric Ass'n, Inc. v. UnitedHealth Group,* 798 F.3d 125, 134 (2d Cir. 2015) (reversing district court's premature dismissal of claim on that basis). On both occasions, the Second Circuit has held that a plaintiff can succeed on both claims, and if the plaintiff does succeed on both, then merely the "*remedy* is limited to such equitable relief as is considered appropriate." *New York State Psychiatric Ass'n, Inc.*, 798 F.3d at 134 (quoting *Devlin,* 274 F.3d at 89-90). Thus, nothing prevents Plaintiff from proceeding on both a claim for violating ERISA § 102 and ERISA § 404 even if both claims are based on the same conduct.

B. The Complaint Adequately Alleges The Board Defendants Breached Their Fiduciary Duties Under ERISA § 404(a)(1)(A) And § 404(a)(1)(B)

Count II alleges that the Board Defendants breached their fiduciary duties under ERISA § 404(a)(1)(A) and (B). Compl. ¶¶ 81-88. ERISA § 404(a)(1) provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries

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Inc., 610 F.3d 452, 466 (7th Cir. 2010) ("[T]he duty is not limited to [a] negative command [but] includes an affirmative obligation to communicate material facts affecting the interests of beneficiaries."); *Kalda v. Sioux Valley Phys. Partners, Inc.*, 481 F.3d 639, 644 (8th Cir. 2007) ("The duty of loyalty requires a fiduciary to disclose any material information that could adversely affect a participant's interests.").

and – (A) for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan" and also "(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(A) & (B).

1. The Complaint Properly Alleges a Breach of ERISA § 404(a)(1)(A)

The Board Defendants argue that Count II fails to state a claim by arguing that the existence of an equal number of Player Association members on the Board means that those player association representatives necessarily "share his interest" and baldly assert that "*every court to address the question has held that the Board has no conflict as a matter of law*." ECF No. 57 at 20 (emphasis added). While Defendants rely exclusively on out-of-Circuit cases, even those cases recognize that the Circuits that have considered the issue "are divided." *Boyd v. Bell*, 796 F. Supp. 2d 682, 690 (D. Md. 2011). As the *Boyd* court itself explained, the Second Circuit has unmistakably held that the fact that the plan administrator is comprised – *as required by statute* – equally of employer representatives and union representatives, "did pose a conflict." *Id.* (citing *Durakovic v. Bldg. Serv. 32 BJ Pension Fund*, 609 F.3d 133, 139 (2d Cir. 2010) (finding plans organized with equal numbers of employer and union representatives "are conflicted").[16] "That the board is (by requirement of statute) evenly balanced between union and employer does not negate the conflict." *Durakovic*, 609 F.3d at 139.

Defendants' argument also ignores that the Supreme Court has previously found that a fiduciary's "deception violated ERISA-imposed fiduciary obligations" because "deceiving [the]

[16] "All but one of the purportedly contrary persuasive opinions … are non-precedential, outdated (pre-*Glenn*), or both." *Durakovic*, 609 F.3d at 139.

plan's beneficiaries in order to save the employer [or here, the Plan] money at the beneficiaries' expense is not to act "solely in the interest of the participants and beneficiaries." *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996). Even though the Supreme Court did not "reach the question whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative," the treatises on which the Supreme Court relied upon apply the same analysis for fiduciaries to disclose truthful information. *Id.* (citing Bogert & Bogert, *Law of Trusts and Trustees* § 543, at 218-219; 2A Scott & Fratcher, *Law of Trusts* § 170, pp. 311-312 (same); Restatement (Second) of Trusts § 170 (same)). Thus, the failure to provide truthful information itself is breach of the duty to act solely in the best interest of the participants and does not require some additional evidence of conflict or improper motive.

2. The Complaint Properly Alleges a Breach of ERISA § 404(a)(1)(B)

The Board Defendants argue that the Complaint fails to adequately allege that they breached their duties of care, skill and prudence under ERISA § 404(a)(1)(B) because these fiduciaries cannot be expected to be "omniscient" or to "know that medical science would advance." ECF No. 57 at 20-21. Yet this argument mischaracterizes the allegations in Count II and is undermined by the very authorities that Defendants cite.

Defendants' own authority explains that "[t]he most important way in which the fiduciary complies with its duty of care is to provide accurate and complete written explanations of the benefits available to plan participants and beneficiaries." *Osberg,* 138 F. Supp. 3d at 552 (quoting *Kenseth v. Dean Health Plan, Inc.*, 610 F.3d 452, 471 (7th Cir. 2010)), *aff'd,* 862 F.3d 198 (2d Cir. 2017). Under Second Circuit law, fiduciaries may be "liable for non-disclosure of information about a current plan when the omitted information was necessary to an employee's intelligent decision about retirement." *Id.* (quoting *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 84 (2d Cir.

2001)). As a result, "[w]hen a plan administrator … fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries." *Id.* (quoting *Devlin*, 274 F.3d at 88). Defendants do not dispute they had a duty to inform participants and arises out of the fiduciaries' position of superior knowledge. ECF No. 57 at 20 (citing *Osberg*, 138 F. Supp. 3d at 552). Because of the "disparity of training and knowledge" between the fiduciary and participant, "the fiduciary's obligations will not be excused merely because [a participant] failed to comprehend or ask about a technical aspect of the plan." *Osberg*, 138 F. Supp. 3d at 552 (*Bixler v. Cent. Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993)). Recently, another court in this Circuit held that a complaint adequately alleged a violation of ERISA § 404(a)(1)(B) for failing to disclose information about the plan because "a fiduciary has a duty to disclose 'material facts, known to the fiduciary but unknown to the beneficiary, which the beneficiary must know for its own protection.'" *Negron v. Cigna Health & Life Ins.*, 300 F. Supp. 3d 341, 361 (D. Conn. 2018) (citing *Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.*, 93 F.3d 1171, 1182 (3d Cir. 1996) and denying motion to dismiss). Contrary to Defendants' assertions, the Complaint does not suggest that Defendants had to predict developments in medical science; instead the Complaint alleges that the Board Defendants, as the fiduciaries, failed to provide sufficient information about meanings of terms in the Plan.

The Complaint sets forth the relevant terms of the plan. Compl. ¶¶ 21-28. The Complaint then explains that "[n]one of the materials provided by the Retirement Board defined the term 'changed circumstances' and the Retirement Board did not explain or inform Hudson about the definition of changed circumstances until his last and final appeal of [request for reclassication]." *Id.* ¶ 30. The Complaint also alleges that the SPD discouraged players such as Mr. Hudson from

retaining counsel during the claims process. *Id.* ¶ 29. To further demonstrate the Board Defendants' omissions, the Complaint meticulously sets forth the history of Hudson's claims process and what was disclosed to him during that process. *Id.* ¶¶ 32-38. Count II explains, consistent with *Osberg*, the duties owed by the Board Defendants. *Id.* ¶¶ 83-84. Incorporating the prior factual allegations, Count II then alleges the Board failed to disclose this critical information to Plaintiff and other participants and by failing to disclose this information violated ERISA § 404(a)(1)(B). *Id.* ¶¶ 85-87. Finally, Count II alleges that Plaintiff and other participants were harmed by the non-disclosure. *Id.* ¶ 88. These allegations are more than sufficient to state a claim that Defendants violated ERISA § 404(a)(1)(B).

C. Count II Is Not Barred By The Statute Of Limitations In ERISA § 413 Under Second Circuit Law

The Board Defendants rely on a simplistic argument that ERISA § 413 contains a six year "statute of repose" and because Mr. Hudson filed his original claim for benefits more than six years ago, therefore his claim is untimely. ECF No. 57 at 15-17. Yet, Defendants argument rests on flawed premises. First, the "6-year statute of repose" is subject to an exception for fraud or concealment, in which case "the 6-year period runs from the plaintiff's discovery of the violation." *Cal. Pub. Emps' Ret. Sys. v. ANZ Secs., Inc*., 137 S. Ct. 2042, 2050 (2017); 29 U.S.C. § 1113. Second, as the Second Circuit explained, "the 'fraud or concealment' provision" actually prescribes "a separate statute of limitations of six years from the date of discovery." *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 189 (2d Cir. 2001). Despite citing these two decisions, Defendants' arguments ignore their holdings.

Unlike some other Circuits, the Second Circuit concluded that the "fraud or concealment" provision should not be fused into a single concept "fraudulent concealment" but instead refers to two distinct concepts: fraud or fraudulent concealment. *Caputo*, 267 F.3d at 189, 190. Fraud

includes not only "false representations of fact, whether by words or conduct," but also *"concealment of that which should have been disclosed." Id.* (emphasis added). Concealment means a "withholding of something which one knows and which one, in duty, is bound to reveal." *Id.* As a result, this "six-year statute of limitations should be applied to cases in which a fiduciary: (1) breached its duty by making a knowing misrepresentation **or omission** of a material fact to induce an employee to act to his detriment *or* (2) engaged in acts to hinder the discovery of a breach of fiduciary duty." *Id.* (bold and underlying emphasis added). As concealment incorporates the fraudulent concealment doctrine, the Second Circuit has long held that the wrong itself was of such a nature as to be self-concealing. *State of N.Y. v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083 (2d Cir. 1988) (finding that a bid-rigging scheme was inherently self-concealing that fraudulent concealment doctrine applied to statute of limitations); *see Caputo*, 267 F.3d at 190 n.3 (citing *Hendrickson Bros.*). The Supreme Court has explained that when a defendant engages in "deceptive conduct [that] may prevent a plaintiff from even *knowing* that he or she has been defrauded," and the plaintiff "remains in ignorance of [the fraud] without any fault or want of diligence or care on his part, the bar of the statute [of limitations] does not begin to run until the fraud is *discovered*." *Merck & Co. v. Reynolds*, 559 U.S. 633, 644–45 (2010). Thus, the statute of limitations contained in ERISA § 413(1) did not start to run until Plaintiff discovered the deceptive acts by Defendants.

In addition to alleging that the Board Defendants failed to properly disclose the standards regarding reclassification, the Complaint alleges that the Board Defendants hid the standard for reclassification from Plaintiff Hudson until the Board's "final decision denying Hudson's appeal for reclassification." Compl. ¶ 38; *see also id.* ¶ 30. The Complaint also alleges that the Board Defendants "actively discouraged players from retaining counsel." *Id.* ¶ 29. The Complaint

explains that the ordinary meaning of terms in the SPD are contrary to the legal jargon of these terms as interpreted by the Board and that Plaintiff only discovered that the Board Defendants were not using the plain and ordinary definitions for those terms until May 2015 (less than 6 years from filing the Complaint). *Id.* ¶¶ 72-73, 76-77. Thus, the Complaint adequately alleges both a self-concealing scheme of deception and concealment that was only discovered less than six years before the Complaint was filed.

As the Complaint has sufficiently alleged a self-concealing scheme, it is not necessary to address Defendants arguments as to "the latest date on which the[se] fiduciaries could have cured the[ir] breach or violations" of ERISA § 404(a). *See* ECF No. 57, at 17-18. Nonetheless, Defendants rely exclusively on out-of-Circuit authority to argue that the latest date on which the Board Defendants could have cured their breach or violation was more than 6 years before the Complaint was filed. *Id.* By contrast, the Second Circuit has held that "no part of plaintiffs' claim is time-barred [where defendant's] conduct in breach of his fiduciary duties 'was in furtherance of a single scheme,'" and because "numerous of [defendant's] breaches occurred within the limitations period," the action was therefore "timely under ERISA § 413(1)(A)." *LaScala v. Scrufari*, 479 F.3d 213, 220 n.1 (2d Cir. 2007) (affirming the decision and adopting the rationale of *LaScala v. Scrufari*, 330 F. Supp. 2d 236, 256 (W.D.N.Y. 2004)). The *LaScala* court found the "action was timely since it was commenced 'within six years of 'the last action [] which constituted a part of the breach or violation,'" *LaScala*, 330 F. Supp. 2d at 256 (quoting *DePerno,* 816 F. Supp. at 144). Here, the Complaint pleads Defendants' breaches as an ongoing scheme through at least November 2015. Compl. ¶ 74. At the earliest, the last action constituting a part of the breach or violation as to Plaintiff occurred in May 2015 (*i.e.*,the denial of reclassification). *Id.* ¶ 38. As the Complaint was filed more less than 6 years later, Count II is timely.

Even if it was necessary to address Defendants' out-of-Circuit authorities interpreting ERISA § 413(1)(B), that interpretation is not shared by all courts, including those in this Circuit. In *New York Dist. Council of Carpenters Pension Fund v. Forde*, 939 F. Supp. 2d 268 (S.D.N.Y. 2013), the court concluded that a breach of fiduciary duty for "failure to disclose material information" was not barred under ERISA § 413(1)(B) because the fiduciary "had a continuing obligation to disclose this material information as long as he was a trustee of the Funds, and 'the latest date on which the fiduciary could have cured the breach or violation' was at the time he stepped down as fiduciary." *Id.* at 281. Courts in this District (and elsewhere) have rejected similar arguments where the defendants have a continuing obligation to take corrective action. *E.g.*, *Buccino v. Cont'l Assurance Co.*, 578 F. Supp. 1518, 1520 (S.D.N.Y. 1983) (finding defendants had a continuing obligation to take corrective action). "One form of remedying the breaches of a co-fiduciary would be to file a suit against the breaching co-fiduciary to … redress any violations of ERISA." *DeFazio v. Hollister, Inc.*, 636 F. Supp. 2d 1045, 1058-59 (E.D. Cal. 2009), *aff'd in part*, 612 Fed. App'x 439 (9th Cir. 2015). Such decisions are consistent with the Second Circuit's well-established precedent in *Morrissey v. Curran*, 567 F.2d 546, 549 & n.9 (2d Cir. 1977) (explaining "fiduciaries [must] take remedial action upon discovery of breaches by co-fiduciaries") and the Supreme Court's more recent decision in *Tibble v. Edison Int'l,* 135 S. Ct. 1823, 1829 (2015) ("[S]o long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely."). As these fiduciaries had a continuing obligation to remedy the prior breaches (even their own), and could have cured the breach at least through May 2015, the Complaint is timely.

IV. COUNT III PROPERLY ALLEGES BREACH OF THE DUTY TO MONITOR AGAINST BOTH THE MANAGEMENT COUNCIL AND THE PLAYERS ASSOCIATION

Count III alleges that the NFL Management Council and the Players Association breached their duty to monitor the members of the Retirement Board and to take appropriate action in response to and to remedy the breaches by the Retirement Board. Compl. ¶¶ 89-95. Specifically, Count III alleges that these Defendants each had the power to both appoint and remove three members of the Retirement Board. *Id.* ¶ 92. Count III explains that the appointment and removal power also obligates each of them to undertake an appropriate investigation "at reasonable intervals to ensure" that their respective appointed fiduciary "is acting in compliance with the terms of the Plan and in accordance with ERISA." *Id.* ¶ 91. Count III then explains what the Management Council and the Players Association would have known if they had fulfilled their fiduciaries duties and identifies six specific items that they should have known. *Id.* ¶ 93. Then Count III identifies six specific actions that the Management Council and the Players Association should have had done if they had "properly monitored the Board Defendants." *Id.* ¶ 94. Such allegations more than sufficiently state a claim for breach of the duty to monitor.

A. The Management Council And Players Association Had A Duty To Monitor The Retirement Board

Defendants argue that they "ha[d] no fiduciary duty to monitor [their] appointees." ECF No. 62 at 12; ECF No. 53 at 11.[17] While Defendants note that the Second Circuit has not directly

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[17] Of all the cases that Defendants cite, only one, *Beauchem v. Rockford Prods. Corp.,* 2003 WL 1562561, at *1 (N.D. Ill. Mar. 24, 2003), even suggests otherwise. But, as one of Defendants' own authorities explains in rejecting *Beauchem*, "[t]he vast weight of authority, and the better-reasoned approach, however, is that an entity 'is a fiduciary within the meaning of ERISA, and thus subject to the fiduciary standard of care, [if] it appoints and removes the members of the administrative committee that administers the ... plan.'" *Int'l Bhd. of Elec. Workers, Local 90 v. Nat'l Elec. Contractors Ass'n*,, 2008 WL 918481, at *6 (D. Conn. Mar. 31, 2008) (quoting *Hickman v. Tosco Corp.,* 840 F.2d 564, 566 (8th Cir.1988)). To the extent that the short, hard-to-

addressed this issue, Defendants' own cases recognize that "there is a duty to monitor appointed fiduciaries under ERISA" and "an 'appointing fiduciary's duty to monitor is well-established.'" *In re Bank of Am. Corp. Sec., Deriv., & Emp. Ret. Income Sec. Act (ERISA) Litig.*, 756 F. Supp. 2d 330, 359 (S.D.N.Y. 2010) (quoting in part *In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461, 477 (S.D.N.Y. 2005) (collecting cases)); *Int'l Bhd. of Elec. Workers, Local 90*, 2008 WL 918481, at *7 ("It is well established that 'the limited power to appoint and remove trustees renders' the ERISA fiduciary 'liable for the breaches those trustees committed.'"); *see Sommers Drug Stores Co. Emp. Profit Sharing Tr. v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1460 (5th Cir. 1986) (recognizing that those with the power to "appoint the plan administrator and the trustees" are plan fiduciaries with respect to those functions). The most recent case in this Circuit addressing this issue again confirmed that "ERISA law imposes a duty to monitor appointees on fiduciaries with appointment power." *Vellali v. Yale Univ.*, 308 F. Supp. 3d 673, 691 (D. Conn. 2018) (citing numerous cases from inside and outside this Circuit).[18] Every Circuit to address the issue has recognized that persons with the power to appoint and/or remove other plan fiduciaries are themselves fiduciaries who have an ongoing duty to monitor those fiduciaries; such duties can arise either from the powers in the Plan document or by exercising such power. *Johnson v. Couturier*, 572 F.3d 1067, 1077 (9th Cir. 2009) (finding that where the Plan specified that the Board of Directors would appoint Trustees as plan administrator, the persons appointing the

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follow decision in *Beauchem* actually held that appointing fiduciaries had no duty to monitor their appointees, such a decision would have been contrary to Seventh Circuit precedent. *Infra* IV.A (citing *Leigh v. Engle*).

[18] Defendants cite *In re Worldcom, Inc.*, 263 F. Supp. 2d 745 (S.D.N.Y. 2003); however, the issue in *Worldcom* was not whether an appointing fiduciary had a duty to monitor, but whether the members of the Board of Directors had fiduciary duties where the Plan only specified that the Company and not the Board of Directors of the Company was the appointing fiduciary. *Id.* at 760. Thus, *Worldcom* would only apply if Plaintiff had also sued the Board of Directors (or equivalent body) of the Management Council or the Players Association.

administrators "also served as ERISA fiduciaries with respect to appointment and removal of [the Plan] trustees"); *Martin v. Feilen*, 965 F.2d 660, 669-70 (8th Cir. 1992) (finding that the power to appoint plan trustees makes him a fiduciary, and that power includes not only the "duty to monitor the actions of appointed trustees" but "may impose a duty to prevent wrongful conduct"); *Leigh v. Engle*, 727 F.2d 113, 134-35 (7th Cir. 1984) (holding that persons and entities responsible for selecting and retaining the plan administrator had a duty to monitor appropriately the administrators' action). In *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, (4th Cir. 1996), the Fourth Circuit held that "the power (through plan amendment) to appoint, retain and remove plan fiduciaries constitutes 'discretionary authority' over the management or administration of a plan within the meaning of § 1002(21)(A)." *Id.* at 1465-66 (citing numerous cases). Moreover, this authority carries with it a duty "'to monitor appropriately' those subject to removal." *Id.* These courts (as well as numerous other courts) have relied on, in part, the DOL Regulations:

> Q: What are the ongoing responsibilities of a fiduciary who has appointed trustees or other fiduciaries with respect to those appointments?
>
> A: At reasonable intervals *the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary* in such manner as may be reasonably expected *to ensure that their performance has been in compliance with the terms of the plan and statutory standards,* and satisfies the needs of the plan. No single procedure will be appropriate in all cases; the procedure adopted may vary in accordance with the nature of the plan and other facts and circumstances relevant to the choice of the procedure.

29 C.F.R. § 2509.75-8 at FR-17 (emphasis added). Thus, the Players Association and the Management Council Defendants' argument that they had no duty to monitor the fiduciaries that they had the power to appoint and remove should be rejected.[19]

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[19] The Players Association observes that it only had the power to appoint three of the six members of the Board. ECF No. 62 at 11. The Complaint also makes that specific allegation. Compl. ¶ 92. As such, it should be obvious the Count III alleges liability against the Players Association for failing to properly monitor the Board members that it had the power to appoint

B. The Complaint Sufficiently Alleges That Defendants Breached Their Duties

The Players Association and the Management Council argue that the Complaint fails to adequately allege that these Defendants breached their duties to monitor. ECF No. 53 at 12-13; ECF No. 62 at 13-14.[20] Of all the cases that these Defendants cite in these sections of their briefs, they were able to find only two – both out-of-Circuit unpublished district court opinions (one of which is actually labeled "NOT FOR PUBLICATION") – that actually dismissed duty of monitor claims for failing to plead sufficient facts and, in both instances, the dismissals were with "leave to amend." *Nicolas v. Trs. of Princeton Univ*., 2017 WL 4455897, at *5 (D.N.J. Sept. 25, 2017) ("Not For Publication"); *White v. Chevron Corp.*, 2016 WL 4502808, at *19 (N.D. Cal. Aug. 29, 2016).[21] Moreover, the complaints in those cases are distinguishable. The *White* "[p]laintiffs concede[d] that they have alleged insufficient facts." *Id.* And the *Nicolas* complaint was apparently

and remove and the Management Council for failing to properly monitor the Board members that it had the power to appoint and remove. Of course, if *either* of these Defendants had engaged in a proper monitoring process, the Complaint alleges that they would have taken action and had they done so, these claims could have been avoided (as the remaining breaching Board members would not have had a majority).

[20] The Players Association correctly observes that the Complaint does not claim that the persons appointed to the Retirement Board were unqualified when appointed. ECF No. 62 at 14. As their own cases illustrate, the failure to appoint qualified individuals is different, although related to the duty to monitor. *In re Lehman Bros. Sec. & ERISA Litig.*, 2011 WL 4632885, at *7 (S.D.N.Y. Oct. 5, 2011) (analyzing these breaches separately); *Int'l Bhd. of Elec. Workers, Local 90*, 2008 WL 918481, at *6. The *Lehman* court did not dismiss the duty to monitor claim for failure to plead sufficient facts, but only because of insufficient allegations about whether the appointed fiduciaries had committed an underlying breach. *Lehman*, 2011 WL 4632885 at *8.

[21] The two Second Circuit cases that they cite do not even involve ERISA. *Burgis v. New York City Dep't of Sanitation*, 798 F.3d 63, 66 (2d Cir. 2015) (Title VII and Section 1981 claims); *Roth v. Jennings*, 489 F.3d 499, 501 (2d Cir. 2007) (1934 Securities Act claim).

devoid of any factual allegations. *Nicolas*, 2017 WL 4455897, at *5 ("Plaintiff's Complaint reads like legal conclusions as opposed to factual allegations").[22] The same is simply not true here.

Courts in this Circuit have repeatedly rejected arguments similar to the ones made by Defendants "because the appropriate ERISA mandated monitoring procedures vary according to the nature of the plan at issue and other facts and circumstances, an analysis of the precise contours of the defendants' duty to monitor at this stage is premature." *In re M&T Bank Corp. ERISA Litig.*, 2018 WL 4334807, at *11 (W.D.N.Y. Sept. 11, 2018); *Yale*, 308 F. Supp. 3d at 692 (same); *In re Xerox Corp. ERISA Litig.*, 483 F. Supp. 2d 206, 215 (D. Conn. 2007) (same). Instead, the courts in this Circuit have concluded that "[a]llegations of inadequate performance by appointee fiduciaries support a claim of breach of the duty to monitor." *In re Fannie Mae 2008 ERISA Litig.*, 2012 WL 5198463, at *7 (S.D.N.Y. Oct. 22, 2012); *In re Am. Int'l Group, Inc. ERISA Litig. II*, 2011 WL 1226459, at *10 (S.D.N.Y. Mar. 31, 2011) (same); *Veera v. Ambac Plan Admin. Comm.*, 769 F. Supp. 2d 223, 231 (S.D.N.Y. 2011) (finding allegations that "potential breaches [by the appointed fiduciaries] were otherwise going unaddressed" suffices "to state a claim against fiduciaries for violation of the duty to monitor."); *In re Morgan Stanley ERISA Litig.*, 696 F. Supp. 2d 345, 366 (S.D.N.Y. 2009) (finding allegations that "the Monitoring Defendants did nothing" was sufficient to state a claim because it "suggest[s] that no system was in place to review and evaluate the performance of their appointees or that potential breaches were otherwise going unaddressed"). As another court in this Circuit explained in rejecting a similar argument, when the complaint pleads sufficient facts about what the appointed fiduciaries did and the appointing fiduciaries failed to take proper action, such allegations "give Defendants 'fair notice of what the

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[22] The *Nicolas* decision cites to *Perez v. WPN Corp.*, 2017 WL 2461452 (W.D. Pa. June 7, 2017), which denied a motion to dismiss where, as here, the plaintiff specified what defendants should have done. *Id.* at **11-15.

claim is and the grounds upon which it rests.'" *In re M&T Bank Corp. ERISA Litig.*, 2018 WL 4334807, at *11 (denying motion to dismiss monitoring claim). This Complaint more than adequately meets these standards.

In addition to sufficiently alleging claims about the breaches by the Board Defendants (whom the Management Council and the Players Association appointed), the Complaint alleges six specific items of information about which Management Council and the Players Association knew or "in the exercise of reasonable diligence" – *i.e.*, had they conducted a proper review on reasonable and regular intervals – should have known. Compl. ¶ 93. None of these are items that would have taken much for the appointing fiduciaries to have discovered if they were actually fulfilling their monitoring duties. Two of these six items concern statements or disclosures (or lack thereof) contained in the SPD. *Id.* ¶ 93(a), (e). The remaining items concern the Board's interpretation of the Plan. *Id.* ¶ 93(b), (c), (d), (f). As the Board Defendants claim that their interpretation was essentially available and known since 2011, fiduciaries with monitoring duties should have been able to discover such information. *See* ECF No. 57 at 11. But these Defendants would have access to *all* decisions interpreting the Plan and could have determined whether proper disclosures had been made simply by inquiring. Finally, the Complaint alleges five specific actions the Management Council and the Players Association could have and should have taken if they had "properly monitored the Board Defendants." Compl. ¶ 94. These allegations contain more than sufficiently specific factual allegations about the activities of the Management Council and the Players Association and how they were deficient. And they more than adequately give these Defendants fair notice of what the claim is and the grounds upon which it rests. As that is all that is necessary, Defendants' motion should be denied.

C. Count III Appropriately Alleges That These Defendants Should Have Taken Action to Remedy the Board Defendants' Breaches

In response to the specific allegations in Paragraph 94 of the Complaint as to what the Management Council and the Players Association should have done, these Defendants attempt to mischaracterize Count III as improperly expanding the duties of the appointing fiduciaries. ECF No. 62 at 8-9; ECF No 53 at 11-13. Yet, Count III merely alleges that when the respective appointees of the Management Council and the Players Association failed to act appropriately, those who appointed them needed to take action. Compl. ¶ 94.[23] Count III alleges that the Management Council and the Players Association should have ensured (at regular intervals) that their appointees complied with the applicable provisions of ERISA or replace them. *Id.* Other than "remov[ing] or replac[ing] the existing Board Defendants," each of the other five actions merely explains what the Management Council and the Players Association should have "require[d] the Board to" do in order to avoid removal. *Id.* ¶¶ 94(a)-(e).[24] Contrary to Defendants' arguments, nothing in Count III (or elsewhere in the Complaint) suggests that either the Players Association or the Management Council was required to oversee each and every medical review or usurp the authority of the Board. *E.g.* ECF No. 53 at 10 (arguing that allegations "go well beyond the [] appointment or removal"), 13 (arguing that Plaintiff is complaining about "second guessing" the Retirement Board's decisions or "simply disagrees with the Retirement's Board's

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[23] The Players Association engages in a long diatribe about amending the terms of the Plan, but Count III does not even mention amending the Plan. Nonetheless, the Players Association and the Management Council had the power to jointly amend the Plan. Compl. ¶¶ 11-12. While this is *not alleged in* Count III, Defendants do not explain why amending the Plan would not be an appropriate remedy for the ambiguous and misleading terms of the Plan that were affecting the beneficiaries of the Plan, particularly as they amended a separate plan. *See id.*; ECF No. 62 at 9-11; ECF No. 53 at 10-13.

[24] Paragraph 94(e) inadvertently omits "require the Board to," but this was a typographical error. Like Paragraphs 94(a) through (d), it should have begun with "require the Board to."

determination."); ECF No. 62 at 9, 12 (making similar arguments). Nor does Count III suggest that either the Players Association or the Management Council should have directed Board to "change its determinations" about any specific player. ECF No. 53 at 11. Instead, all that Count III alleges that the Players Association or the Management Council should have taken certain actions to remedy the Board Defendants' breaches had the Players Association or the Management Council properly monitored their appointees. Compl. ¶ 94(a)-(f).

As the Management Council's own authority recognizes, "[i]n addition to the duty to monitor, the [appointing] fiduciary also has 'the duty to take action upon discovery that the appointed fiduciaries are not performing properly.'" *Int'l Bhd. of Elec. Workers, Local 90*, 2008 WL 918481, at *7 (quoting *Liss v. Smith*, 991 F. Supp. 278, 311 (S.D.N.Y. 1998)). Numerous courts in this Circuit have similarly concluded that "[t]he duty to monitor carries with it the duty to take action upon discovery that the appointed fiduciaries are not performing properly." *Util. Audit Group v. Capital One, N.A.*, 2015 WL 1439622, at *9 (E.D.N.Y. Mar. 26, 2015) (denying motion to dismiss); *Whitfield v. Tomasso*, 682 F. Supp. 1287, 1305 (E.D.N.Y. 1988) ("[B]y failing to take appropriate steps to remove Union-appointed trustees who it knew were breaching their fiduciary obligations to the Fund, defendant" breached its fiduciary duties).[25] In response to specific allegations in Count III about what these Defendants should have done, they argue that they "ha[d] no duty to remedy the Retirement Board's alleged breaches." ECF No. 62 at 9; *see* ECF No. 53 at 10-11. Thus, Defendants' argument that they had no duty to take action is simply

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[25] Contrary to the unsupported assertions by these Defendants, the court in *Tomasso* found that Union defendant breached its duties in connection with failure to remove the Union-appointed trustees. *Id.*

contrary to even their own authority (and itself suggests that these Defendants breached their duties as they did not even understand their obligations).

Finally, the Players Association cite *Kinra v. Chicago Bridge & Iron Co.*, 2018 WL 2371030, at *6 (S.D.N.Y. May 24, 2018) to argue that the "allegations…are not specific to any Defendant." ECF No. 62 at 15.[26] The *Kinra* court was not discussing a duty to monitor claim and Count III alleges that *neither* the Players Association nor the Management Council acted properly. There is no *group pleading* as used by the *Kinra* court; and as Count III does not allege fraud or mistake, it is governed by Rule 8.[27] Contrary to Defendant's lone authority, most district courts in this Circuit have repeatedly concluded, based on Second Circuit authority and ERISA's co-fiduciary liability provision, that "[a] failure to monitor appointees and to remove non-performing fiduciaries thus renders the appointing fiduciary jointly and severally liable for the appointed fiduciaries' breaches." *Liss*, 991 F. Supp. at 311 (citing *Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1987) (finding co-fiduciaries jointly and severally liable for fiduciary breaches) and 29 U.S.C. § 1105(a)); *Util. Audit Group*, 2015 WL 1439622, at *9 (same); *Int'l Bhd. of Elec. Workers*, 2008 WL 918481, at * 7 (same); Monitoring fiduciaries have liability under ERISA § 405(a)(2) and (3) if their breaches (e.g. failure to monitor) allow their appointees to commit a breach or if they know of and fail to remedy a breach. *See id.*; *see also Chesemore v. All.*

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[26] The Players Association's reliance on *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090 (9th Cir. 2004), is also misplaced. This case is cited for the proposition that the Players Association cannot be liable because it is not given discretion with respect to decisions about the Plan. As plaintiff is alleging a breach of duty to monitor, this case is irrelevant. The Players Association acts with its power to appoint and remove board members. The fact that the Players Association and the Management Council individually do not elect a majority of the board does not excuse them from acting as to the members they do appoint.

[27] The *Kinra* court inexplicably relied on a securities fraud case to improperly import a scienter requirement to an ERISA claim. *Kinra*, 2018 WL 2371030, at *6 (citing *C.D.T.S. v. UBS AG*, 2013 WL 6576031, at *6 (S.D.N.Y. Dec. 13, 2013)).

Holdings, Inc., 886 F. Supp. 2d 1007, 1057 (W.D. Wis. 2012) (finding entity with monitoring responsibility liable after trial as a co-fiduciary for its appointee's breach under both ERISA § 405(a)(2) and (3)), *aff'd*, 829 F.3d 803 (7th Cir. 2016). Here, Count III properly alleges what both the Players Association and the Management Council should have done to properly monitor and remove the Board and by failing to do so, they are liable because *neither* of them took such actions. Thus, Count III properly alleges a claim for breaching the duty to monitor.

V. PLAINTIFF HAS STANDING TO ASSERT COUNT IV TO ENFORCE THE TERMS OF THE PRE-2017 PLAN PURSUANT TO ERISA § 502(A)(3)

The Complaint alleges that Mr. Hudson received a notice of a summary of material modifications to the NFL Player Disability & Neurocognitive Benefit Plan in February 2018. Compl. ¶ 47. This Notice informed Mr. Hudson that "[t]he standard for reclassifying [participants'] total and permanent disability benefits" had changed, including the standard as to what constitutes "changed circumstances." *Id.* The Retirement Board is the plan administrator for both the Plan at issue as well as the NFL Player Disability & Neurocognitive Benefit Plan. *Id.* ¶ 49. As this change (or a similar proposed change) might affect Mr. Hudson and his request for reclassification, Mr. Hudson's counsel sent a letter on behalf of Mr. Hudson to the Retirement Board inquiring if the changes in the Notice would "apply retroactively to persons such as Mr. Hudson." *Id.* ¶ 48. In response to Mr. Hudson's inquiry, the Board responded through its counsel and refused to provide an answer. *Id.* ¶ 50. As the Board refused to respond, Count IV seeks relief under ERISA § 502(a)(3) and 29 U.S.C. § 1132 (a)(3), to ensure that his rights and benefits are and will be determined under the Plan in effect when they became eligible for benefits and, as necessary, to have the Plan reformed accordingly and/or receive injunctive relief requiring administration of the Plan in a manner consistent with the terms of the Plan in existence at the time they became eligible for benefits. *Id.* ¶ 101.

A. Plaintiff Has Article III Standing to Seek Declaratory and Injunctive Relief on Count IV

The Board Defendants' only argument as to Count IV is that Hudson lacks standing to because they assert that "Hudson has not suffered any injury fairly traceable to any act or omission and "therefore has no constitutional standing." ECF No. 57 at 21-22.[28] Underlying this argument is a fallacious assumption that constitutional injury requires economic harm. *See id.* But there is no such requirement where, as with Count IV, the relief requested is injunctive.

"In order to have standing to seek injunctive relief based on defendants' statutorily-created disclosure or fiduciary responsibilities, plaintiff need only allege that she was 'generally harmed by the deprivation of a specific right;' she need not show that she was 'specifically injured, pecuniarily or otherwise.'" *Gates v. United Health Group Inc.*, 2012 WL 2953050, at *9 (S.D.N.Y. July 16, 2012) (citing *Kendall v. Emps. Ret. Plan of Avon Prods*, 561 F.3d 112, 120-21 (2d Cir. 2009) and finding on motion to dismiss that complaint had adequately alleged breach of fiduciary duty and other disclosure obligations). Adopting the view of the Third Circuit, the Second Circuit has recognized that a participant does not need to show individual harm to "have Article III standing to obtain injunctive relief related to ERISA's disclosure and fiduciary duty requirements:"

> [T]he *disclosure requirements* and *fiduciary duties* contained in ERISA create in [a participant] certain rights, including the rights to receive particular information and to have [defendant] act in a fiduciary capacity. Thus, [plaintiff] need not demonstrate actual harm in order to have standing to seek *injunctive relief* requiring that [defendant] satisfy its statutorily-created disclosure or fiduciary responsibilities.

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[28] Defendants do not introduce any additional materials in support of their standing argument as to Count IV. ECF No. 57 at 21-22. "When standing is challenged on the basis of the pleadings," the court must 'accept as true all material allegations of the complaint, and ... construe the complaint in favor of the complaining party.'" *Fin. Insts. Ret. Fund v. Off. of Thrift Supervision*, 964 F.2d 142, 149 (2d Cir. 1992) (finding that district court "was obliged to accept as true" allegations when ruling on the "motion to dismiss for lack of standing" and there were sufficient "violations of ERISA section 404 to establish that the plan participants have been injured within the meaning of the statute and therefore also within the meaning of Article III.").

Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 433 F.3d 181, 199 (2d Cir. 2005) (quoting *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 456-57 (3d Cir. 2003)).[29] Here, Count IV specifically seeks *exclusively* injunctive and related declaratory relief. Compl. ¶ 101 & Prayer for Relief ¶ H. Thus, Plaintiff does not need to show actual harm to have Article III standing to require Defendants to satisfy their fiduciary and other statutory obligations.

The Supreme Court has recognized that the purpose of ERISA's disclosure requirements is to "ensure[ ] that 'the individual participant knows exactly where he stands with respect to the plan.'" *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 118 (1989) (quoting H.R. Rep. 93-533, at 11 (1973)). The Second Circuit has recognized a fiduciary duty by the plan administrator to provide information in response to a participant's inquiry about benefits. *Devlin*, 274 F.3d at 88 (citing *In re Unisys*, 57 F.3d at 1264); *Becker v. Eastman Kodak Co.*, 120 F.3d 5, 10 (2d Cir. 1997) (recognizing that ERISA fiduciaries have a "fiduciary duty to provide [participants] with complete and accurate information about her retirement options").[30] Another court in this Circuit found that a fiduciary cannot have its representatives fail to respond to inquiries about benefits and benefit changes:

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[29] The Third Circuit in turn relied on the Second Circuit decision that "ERISA's goal of deterring fiduciary misdeeds" supports a "broad view of participant standing under ERISA," and that a violation of § 404 satisfies the injury requirement of Article III. *Horvath*, 333 F.3d at 456 (quoting *Financial Inst. Ret. Fund*, 964 F.2d at 149 and citing *Larson v. Northrop Corp.*, 21 F.3d 1164, 1171 (D.C. Cir. 1994) (holding plaintiff need not demonstrate actual harm in order to file suit for alleged breach of fiduciary duty under ERISA § 404).

[30] *See also Switzer v. Wal–Mart Stores, Inc.*, 52 F.3d 1294, 1299 (5th Cir. 1995) (explaining that upon receiving an inquiry from a beneficiary, a plan administrator "has a fiduciary obligation to respond promptly and adequately in a way that is not misleading"); *Electro-Mech. Corp. v. Ogan*, 9 F.3d 445, 451 (6th Cir. 1993) ("ERISA imposes a duty upon fiduciaries to respond promptly and adequately to employee-initiated inquiries regarding the plan or any of its terms.").

> A fiduciary cannot leave its front-line benefits counselors in the dark, or instruct them to give noncommittal and nonfactual responses to inquiries regarding potential benefit changes, if the information that is withheld is material to beneficiaries. Such a stance is inconsistent with the mandate that a fiduciary discharge its duties with the care, skill, prudence and diligence required by the statute.

Mullins v. Pfizer, Inc., 147 F. Supp. 2d 95, 109 (D. Conn. 2001) (finding failure of representative of plan administrator to provide material information to participant was breach of fiduciary duty). Indeed, the Board Defendants do not even suggest that Mr. Hudson did not have the right to obtain a response to his 2018 inquiry. *See* ECF No. 57 at 21-22. Thus, the Count IV properly and adequately seeks equitable relief as a result of the Board Defendants failure to properly respond to Plaintiff's inquiry concerning the amendment and interpretation of the Plan.[31]

B. Count IV Alleges A Valid Claim Against the Management Council and Players Association Defendants

The Management Council and the Players Association argue that Count IV fails because they are not fiduciaries with respect to enforcing the terms of the Plan. ECF 53 at No. 14; ECF No. 62 at 17. But these Defendants acknowledge that they have the power to amend the plan. *See id.*; Compl. ¶¶ 4-5. ERISA § 502(a)(3) allows a participant "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3). ERISA § "502(a)(3) itself imposes certain duties, and therefore [] liability under that provision does not depend on whether ERISA's substantive provisions impose a specific duty on the party being sued." *Harris Tr. & Sav. Bank v. Salomon*

[31] ERISA § 502(a)(3) creates a cause of action for a declaratory judgment and the declaratory relief is equitable where the nature of the controversy is equitable. *Cognetta v. Bonavita*, 2018 WL 2744708, at *8 (E.D.N.Y. June 7, 2018) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 26-27 (1983)).

Smith Barney, Inc., 530 U.S. 238, 245 (2000). Importantly, ERISA § 502(a)(3) has "no limit … on the universe of possible defendants." *Id.* at 246 (finding non-fiduciary can be sued under ERISA § 502(a)(3)). Thus, these Defendants' arguments that they are not fiduciaries is irrelevant as they may be named as defendants in an action under ERISA § 502(a)(3).[32]

These Defendants are also suggesting that there is no claim against them under ERISA § 502(a)(3). *See* ECF No. 62 ad 17; ECF No. 53 at 14.[33] In addition to ERISA § 502(a)(3) imposing obligations, contract law "guides [the] determination of whether, under ERISA, plaintiffs are entitled to "enforce [their] rights under the terms of the plan." *Devlin*, 274 F.3d at 84 n.4. Applying such principles, courts recognize that "a *post hoc* amendment clearly cannot alter a plan provision in effect at the time performance under the plan became due." *Gorman v. Carpenters' & Millwrights' Health Benefit Tr. Fund*, 410 F.3d 1194, 1198 (10th Cir. 2005) (quoting *Member Servs. Life Ins. Co. v. Am. Nat'l Bank & Tr. Co.*, 130 F.3d 950, 957 (10th Cir. 1997)); *Wal-Mart Stores, Inc. Assocs' Health & Welfare Plan v. Wells*, 213 F.3d 398, 403 (7th Cir. 2000) (relying on *Member Services* and rejecting as "astonishing" an argument that an amendment could be applied after a plaintiff had been injured). A welfare plan's benefits vest when performance is due. *Gorman*, 410 F.3d at 1198 (citing *Member Servs.*, 130 F.3d at 956). Count IV seeks a determination that Plaintiff and other Class Members are entitled to have their rights determined

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32 As Count IV seeks a determination that Defendants may not retroactively amend the terms of the Plan or enforce a post hoc amendment, it makes sense to include those that have the power to amend the plan as well as those that have the power to enforce the Plan. Indeed such joinder is proper under Rule 19 and 20.

33 This is not actually a standing argument. "The Supreme Court has recently clarified, [] that what has been called 'statutory standing' in fact is not a standing issue, but simply a question of whether the particular plaintiff 'has a cause of action under the statute.'" *Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 359 (2d Cir. 2016) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014)).

under the Plan terms in effect when they became ineligible for benefits and not based on some subsequent amendment. Compl. ¶¶ 99, 101. As the Board Defendants, the plan administrator, has failed to provide any such assurance (and even now fails to so state), Plaintiff is entitled to seek a determination pursuant to ERISA § 502(a)(3) that his benefits will be governed by the Plan in effect at the time when he became eligible for benefits.

VI. COUNT V FOR VIOLATIONS OF ERISA § 410 AND ERISA§ 404(A)(1)(A) AND (B) HAS BEEN PROPERLY ASSERTED AGAINST ALL DEFENDANTS

Count V of the Complaint seeks relief from all Defendants on the basis that the Plan's limitations provision violates ERISA. Compl. ¶¶ 102-112.[34] None of the Defendants challenge that Count V states a claim under ERISA § 410 or 404(a)(1)(A) & (B). *E.g.*, ECF No. 57 at 23 ("Assuming that Plan Section 11.7(b) violates ERISA"). Instead, Defendants argue that the Plan does not conflict with ERISA and even if it does, they are entitled to have a Plan provision that conflicts with ERISA's statute of limitations. *Id.* at 24.

Defendants' argument that the Plan limitations provision does not conflict with ERISA is contradicted by the express language of the Plan and SPD. Section 11.7(b) of the 2009 Plan Document provides with respect to actions other than those related to Adverse Benefit Determinations (defined in Section 11.7(a) of the Plan Document) as follows:

> [N]o action alleging an omission, violation, or breach of any responsibility, duty, or obligation imposed by this Plan (or any internal rule, guideline, or protocol) or any applicable law may be commenced after the earlier of --
>
> (l) six years after the date of the omission, violation, or breach, or

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[34] The Player Association and Management Council suggest that they are not proper defendants under Count V. ERISA § 502(a)(3) allows any person to be named as a defendant for violation of ERISA. *Supra* V.B. As the Players Association and Management Council have the ability to amend the Plan and create its terms, they are proper defendants to challenge an amendment. Count V specifies that the portion of that claim under ERISA § 404(a)(1) is only brought against any fiduciary who would take advantage of such position. As they are fiduciaries with respect to their monitoring duties, Count V can also be asserted against them. *Supra* IV.A.

> (2) three years after the earliest date on which the plaintiff had actual ***or constructive*** knowledge of the omission, violation, or breach,
>
> except as provided in ERISA section 413 (but only where the fraud or concealment is ***separate from the offense and intended to conceal the existence of the offense***).

Compl. ¶ 104 (bold emphasis illustrates the conflict with ERISA § 413). Likewise, in a section entitled "Limitation on Actions," the SPD states as follows:

> With respect to all other types of claims [i.e. other than a benefit claim], you may not commence a legal action in a court after the earlier of
>
> - six years after the date of any omission, violation, or breach of any responsibility, duty, or obligation imposed by the Retirement Plan or applicable laws, or
> - three years after the earliest date that you knew ***or should have known*** of any such omission, violation, or breach, except that, depending on the facts, ***certain exceptions may apply***.
>
> If you do file a legal action after these limitation periods have expired, the court may dismiss your claim.

Compl. ¶ 106 (bold emphasis illustrates the conflict with ERISA § 413). In contrast, ERISA § 413 provides as follows:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of —
>
> > (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
> >
> > (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
> >
> > except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113. Unlike Section 11.7(b) of the Plan Document, ERISA § 413 does not have a

provision that applies a constructive knowledge standard to limitations on actions with respect to a fiduciary's breach of any responsibility, duty, or obligation under Part IV of ERISA. *See LaScala v. Scrufari*, 479 F.3d 213, 220 n.1 (2d Cir. 2007) (finding that "ERISA § 413(2) requires actual knowledge," and a finding that certain plaintiffs had constructive knowledge does not satisfy this provision.). Congress specifically removed a constructive knowledge standard from being imposed to limitations on actions with respect to a fiduciary's breach of any responsibility, duty, or obligation under Part IV of ERISA after January 1, 1988. *Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO, Dist. Lodge No. 157 by Roy v. Rome Cable Corp.*, 810 F. Supp. 402, 409 (N.D.N.Y. 1993) (citing Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100–203, § 9342, 101 Stat. 1330, 1330–371 (1987)). If allowed, this constitutes a significant modification of the Second Circuit's standard for actual knowledge. Additionally, the Plan's attempt to modify the "fraud or concealment" exception conflicts with the Second Circuit's interpretation of that exception. *Supra* III.C. Moreover, the SPD fails to disclose how these provisions alter ERISA or even mention the "fraud or concealment" exception. Compl. ¶¶ 104-105, 108.

Defendants argue that plans can adopt different limitations periods. ECF No. 57 at 24. Yet, Defendants completely overlook that in *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99 (2013), the Supreme Court's holding was expressly conditioned on the following: "*[a]bsent a controlling statute to the contrary*, a participant and a plan may agree by contract to a particular limitations period, even one that starts to run before the cause of action accrues, as long as the period is reasonable." *Id.* at 105-06 (emphasis added). The Board Defendants cite a Sixth Circuit case that held section 1113 of ERISA is not a controlling statute and merely a default. ECF No.

57 at 24 (citing *Hewitt v. W. & S. Fin. Grp. Flexible Benefits Plan*, 2018 WL 3064564 (6th Cir. Apr. 18, 2018)). However, the holding is not consistent with *Heimeshoff*.

In *Heimeshoff*, the underlying cause of action was a claim under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Unlike claims for breach of fiduciary duty which are governed by ERISA § 413, "ERISA § 502(a)(1)(B) does not specify a statute of limitations." *Heimeshoff*, 571 U.S. at 105. The Supreme Court recognized this distinction as it explained that there was no contention that "*ERISA's statute of limitations for claims of breach of fiduciary duty controls this action to recover benefits*." *Id.* at 110.

In contrast to the brief Sixth Circuit decision, which is short on analysis (and brought by a *pro se* plaintiff), a number of district courts have decided to the contrary in decisions issued after the case Defendants cite. *Winburn v. Progress Energy Carolinas, Inc.*, 2015 WL 505551, at *11 (D.S.C. Feb. 6, 2015) ("[T]he Supreme Court specifically distinguished Section 1113 (the breach of fiduciary duty statute of limitations) from its holding that, where the statute creating the cause of action is silent regarding a statute of limitations, the plan could provide a time limit."); *Chelf v. Prudential Ins. Co. of Am.*, 2018 WL 4219424, at *7 (W.D. Ky. Sept. 5, 2018) ("As Plaintiff notes, *Heimeshoff* centered on a claim under Section 1132(a)(1)(B), which does not specify a statute of limitations, a distinction the Supreme Court noted from claims brought under Section 1132(a)(3); *see also De Conninck v. Provident Life & Accident Ins. Co.* 747 F. Supp. 627 (D. Kan. 1990) (Court found that the policy could not provide the starting point for the statute of limitations where the ERISA breach of fiduciary duty statute of limitations had been established by Congress). These decisions are the better reasoned and are consistent with *Heimeshoff*.

Strangely, Defendants argue that Section 11.7(b) of the Plan Document does not attempt to relieve them of their responsibility or liability to discharge their fiduciary duties under ERISA.

ECF No. 57 at 24. Yet, this provision, if allowed, would bar certain breach of fiduciary duty claims (and other claims under Part IV of ERISA) that ERISA § 413 would not and where ERISA § 413 would permit such an action. As such, Count V properly states a claim that Section 11.7(b) of the Plan Document is void as against public policy.

Defendants argue that Plaintiff has no standing because he has not been harmed but so long as the provision remains in the Plan documents, he is continually harmed. ECF No. 57 at 23; ECF No. 62 at 18.[35] Defendants ignore that this claim exclusively seeks declaratory and injunctive relief. Compl. ¶ 112. In this Circuit, a plan participant has Article III standing to obtain injunctive relief related to ERISA's disclosure and fiduciary duty requirements without a showing of individual harm to the participant. *Supra* V.A. (citing *Cent. States Se. & Sw. Areas Health & Welfare Fund*, 433 F.3d at 199).[36]

Accordingly, Count V properly states a claim against all Defendants.

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss should be denied in their entirety.

[35] The Retirement Board makes this argument despite having raised the statute of limitations defense in its motion to dismiss. *See* ECF No. 57 at 15-17.

[36] The Board Defendants argue that portions of Count V is barred by the statute of limitations argument that they make with respect to the ERISA § 102 claim asserted in Count I and the ERISA § 404 claim asserted in Count II. For the same reasons explained there, those portions of the claim are not barred by the statute of limitations. *Supra* II.B. & III.C.

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